CompTel ALTS

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13 June 2005

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WCB Docket Nos. 01-338, 04-313

Dear Ms. Dortch:

On May 27, 2004, BellSouth filed a Petition for Forbearance pursuant to section 10(c) of the Communications Act, as amended, and section 1.53 of the Federal Communications Commission's (FCC or Commission) rules.[1] In its petition, BellSouth asks the Commission to forbear from "[s]ection[] 252 with respect to commercially negotiated agreements for the provision of wholesale services that are not required under [s]ection 251."[2]

The Commission must reject BellSouth's forbearance petition, which seeks relief from the application of statutory provisions to contractual agreements that, according to BellSouth, are already outside of their ambit. Specifically, BellSouth asks the Commission to declare that what BellSouth

[1] 47 U.S.C. § 160(c); 47 CFR § 1.53. On the same day, BellSouth filed an "Emergency Petition for Declaratory Ruling" seeking the same relief as requested in the instant forbearance petition.

[2] Petition for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Section 252 With Respect to Non-251 Agreements (filed May 27, 2004), WCB Docket Nos. 01-338 and 04-313, at 1 (BellSouth Forbearance Petition).

calls "non-251" agreements are not subject to the obligations of section 252 of the Act.[3] At the same time, however, BellSouth argues that "agreements for wholesale services that are not provided under section 251 are not subject to filing and approval under section 252," an interpretation that BellSouth argues is the current state of the law even in the absence of a grant of its forbearance petition.[4] As the Commission concluded recently in its order rejecting SBC's request for forbearance from the application of Title II provisions to SBC's IP-enabled services, forbearance is "inappropriate" where the petitioner "asks us to forbear from requirements that may not even apply to the facilities and services in question."[5] Indeed, the Commission concluded that "section 10 neither contemplates nor permits grants of forbearance relating to obligations that "may or may not" apply to the telecommunications carrier or telecommunications service at issue."[6] In the same way that SBC in its defective forbearance petition asked for forbearance from the application of statutory provisions and rules that it refused to concede actually applied to the services in question, BellSouth in the instant petition argues that "[s]ection 252 by its terms relates only to agreements negotiated

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[3] *Id.*

[4] *Id.*

[5] In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II
Common Carrier Regulation to IP Platform Services, WCB Docket No. 04-29, FCC 05-95, at ¶ 3 (rel. May 5, 2005) (SBC IP Forbearance Order).

[6] *Id* at ¶ 5. *See also id. at* ¶ 6 ("Moreover, we find that the grant of a petition seeking forbearance from a requirement that does not unambiguously apply is contrary to the public interest, and therefore does not satisfy the requirements for granting forbearance under section 10(a)(3) of the Act.").

pursuant to [s]ection 251."[7] Thus, BellSouth's petition asks the Commission to forbear from the application of section 252 of the Act to agreements that, according to BellSouth, already fall outside of the purview of section 252.[8] Consistent with the Commission's disposition of the SBC IP-enabled forbearance petition, BellSouth's petition is procedurally defective and must be rejected.[9]

It is also unclear from BellSouth's forbearance petition what exactly a "non-251" agreement might be. BellSouth never defines the term, except to suggest that a "non-251" agreement includes a contract term that involves a network element for which the Commission has found no impairment.[10] What is unclear is whether the mere existence of an agreement for a single "non-251" element in a multi-hundred page interconnection agreement somehow transforms that entire agreement – which may include dozens of provisions related to section 251 obligations – into a "non-251" agreement that would no longer be subject to section 252. BellSouth does not define the parameters of its forbearance request in a way that permits the Commission – or interested parties – to determine the exact nature of the hypothetical agreements that BellSouth believes would be subject to a grant of

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[7] BellSouth Forbearance Petition at 1.

[8] That is not to say that BellSouth is correct in its interpretation of the current state of the law governing sections 251 and 252 of the Act. But as with SBC's IP forbearance petition, BellSouth cannot lawfully ask the Commission to forbear from the application of statutory provisions and rules that BellSouth is unwilling or unable to argue actually apply to the specific situations for which forbearance is sought.

[9] *See SBC IP Forbearance Order* at ¶ 11 ("In addition, as explained above, such a framework would likely lead to petitions posing hypothetical questions regarding real or imagined services.").

[10] BellSouth Forbearance Petition at 3.

forbearance.[11] Moreover, BellSouth states that it "seeks forbearance only with respect to contractual obligations that do not arise under section 251" – obligations that BellSouth repeatedly argues do not apply under existing rules.[12]

In addition to the procedural defects evident on the face of its petition, BellSouth also fails to carry its burden to satisfy the rigorous forbearance standard of section 10(a) of the Act. Although BellSouth claims that forbearance is necessary to "eliminate obstacles to the successful negotiation of commercially reasonable interconnection arrangements," it does not cite a single example of the type of thwarted negotiation that forbearance would prevent. Surely BellSouth could have come up with at least one example of a negotiation with a competitive carrier that, but for the operation of section 252 of the Act, would have resulted in a mutually beneficial contractual arrangement between the parties. Certainly such evidence of failed negotiations is vital to satisfaction of the statutory standard for forbearance, which requires the Commission to conclude that enforcement of the statute is "not necessary" to ensure that BellSouth's future negotiations with competitive carriers are "just and reasonable and not unjustly or unreasonably discriminatory;"[13] that enforcement of the statute is "not

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[11] *See SBC IP Forbearance Order* at ¶ 14 ("We also deny SBC's petition for the independent reason that it
is not sufficiently specific to determine whether the requested forbearance satisfies the requirements of
section 10.").
[12] *Id.* at 6.
[13] 47 U.S.C. § 160(a)(1).

necessary for the protection of consumers;"[14] and that failure to enforce the statute is "consistent with the public interest."[15] Mere supposition on the part of BellSouth does not satisfy that statutory standard.[16]

As to the first prong of the statutory forbearance test, BellSouth alleges that the protections of section 252 of the Act are unnecessary because, once a non-impairment finding is made by the Commission as to an element, "the marketplace can be relied on to assure that the ILECs' wholesale rates remain just and reasonable." [17] As with the rest of the suppositions in its petition, BellSouth does not cite a single example where the marketplace has ensured that competitive carriers can access just, reasonable, and nondiscriminatory rates, terms and conditions from BellSouth because (and only because) an agreement is not subject to section 252. Given BellSouth's view that the current state of the law does not require the filing of "non-251" agreements pursuant to section 252, surely it could provide at least one such an example.

Similarly, BellSouth fails to satisfy its burden to prove that forbearance from section 252 will not harm consumers.[18] BellSouth argues that "consumers will be the ultimate beneficiaries of forbearance" because elimination of filing requirements "will promote the ability of ILECs and

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[14] 47 U.S.C. § 160(a)(2)
[15] 47 U.S.C. § 160(a)(3).
[16] *See SBC IP Forbearance Order* at ¶ 10 ("We also believe that granting forbearance petitions "to the extent" that particular regulations might otherwise apply would create serious administrability concerns and would threaten the Commission's ability to determine its own priorities and set its own agenda.").
[17] BellSouth Forbearance Petition at 4.
[18] 47 U.S.C. § 150(a)(2).

CLECs to reach commercially reasonable agreements, and such agreements will foster sustainable competition and innovation." The evidence of marketplace developments since the FCC phased out numerous unbundling requirements in the Triennial Review Remand Order suggests strongly that BellSouth has its hypothesis exactly backwards. Within 90 days of the FCC's decision to reverse its pro-competitive unbundling regime, the nation's two largest competitive carriers – AT&T and MCI – with whom the incumbents have (according to BellSouth) "every incentive to reach commercially reasonable wholesale arrangements in order to maintain traffic on their networks," not only failed to reach any such agreements, they joined forces with the incumbent LECs.[19] If the two largest competitive carriers in the country failed to reach commercial agreements that would allow them to remain in business, it is impossible to give credence to BellSouth's postulation that "ILECs have every incentive" to reach commercial arrangements with competitive carriers in the absence of regulatory oversight.

Finally, BellSouth fails to meet its burden to prove that forbearance is in the public interest. Despite its self-serving assertion that requiring agreements to be filed with the state commissions "injects an unacceptable level of uncertainty into the negotiation process," BellSouth fails to provide a single example of something it would provide to competitive carriers but for the existence of a requirement to file an agreement with the appropriate

[19] BellSouth Forbearance Petition at 3-4.

state commission. Ironically, the only support BellSouth cites for its argument is the FCC's effort, in March of 2004, to facilitate commercial negotiations between the Bell companies and the nation's largest competitive carriers – the very negotiations that failed so spectacularly that, following the Commission's decision to eliminate numerous local unbundling rules, the victims of that failed negotiation were quickly swallowed by the Bell companies that refused to negotiate with them.[20] It strains credibility for BellSouth to argue that it and its Bell brethren have any incentive to enter into real commercial relations with competitive carriers, when the track record of the Bell companies in negotiating such arrangements is so demonstrably poor.

In its order revising the so-called "pick and choose" rules adopted to implement the requirements of section 252(i) of the Act, the Commission concluded that an "all or nothing" rule – requiring carriers to adopt an entire interconnection agreement, rather than individual provisions of that agreement – would promote commercial negotiations between incumbents and their competitors. Specifically, the Commission concluded that "the record evidence supports our conclusion that an all-or-nothing rule would better serve the goals of sections 251 and 252 to promote negotiated interconnection agreements because it would encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the

[20] *Id.* at 5 (*citing* Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, rel. March 31, 2004).

existing rule."[21] Thus, the Commission concluded that the elimination of the pick and choose rules would promote the kind of negotiations that BellSouth now suggests are only possible through a complete elimination of incumbent obligations under section 252. Not only did the Commission reject the notion that section 252 acted as a deterrent to negotiations, it concluded that it was a vital backstop to ensure the success of such negotiations, because "the arbitration process created in the Act is often invoked under the current pick-and-choose rule and will remain as a competitive safeguard for all parties."[22] Thus, the Commission concluded that, because section 252's requirements would remain in force, "an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers" pursuant to section 252.[23] Were the Commission to grant BellSouth's request for forbearance from section 252, it would eliminate the only protection against discrimination that the Commission concluded made feasible the adoption of an "all or nothing" rule.[24]

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[21] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WCB No. 01-338, FCC 04-164, at ¶ 12 (rel. July 13, 2005).
[22] *Id.* at ¶ 14.
[23] *Id.* at ¶ 19.
[24] *See id.* at ¶ 20 ("Section 252(e)(1) requires carriers to file any negotiated or arbitrated interconnection agreement with the relevant state commission for approval. Under section 252(e)(2)(A)(i), state commissions may reject a negotiated agreement if "the agreement (or any portion thereof) discriminates against a telecommunications carrier not a party to the agreement. Following a state commission determination, any party may bring an action in an appropriate federal district court to determine whether the agreement meets the requirements of sections 251 and 252.72 In addition, requesting carriers seeking remedies for

The Commission also concluded that the provisions of section 252 provide vital protection against incumbent discrimination in favor of affiliated entities. Specifically, in response to the argument on the record that the elimination of "pick and choose" would allow incumbents to insert poison pill provisions into agreements that rendered them tenable only to affiliates of the incumbent, the Commission concluded that the nondiscrimination provisions of section 252 "apply to incumbent LECs' interconnection agreements with affiliates" and thus "[w]e have no reason to believe, based on the record, that the Act's protections against discrimination will be any less effective in this context."[25] BellSouth now asks the Commission to forbear from the very statutory provision that the Commission concluded was crucial to preventing incumbent carriers from negotiating favorable deals with their own affiliated entities, and refusing to make such provisions available to their competitors.

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alleged violations of section 252(i) may file complaints pursuant to section 208.73 Given the statutory nondiscrimination provisions and the procedural mechanisms to ensure compliance with the Act's nondiscrimination requirements at both the state and federal levels, we conclude that the Act provides requesting carriers with adequate protections against discrimination without the pick-and-choose rule.").

[25] *Id.* at ¶ 23.

In conclusion, the Commission should reject BellSouth's forbearance petition, based on the same procedural defects the Commission found fatal to SBC's IP Forbearance Petition. In any event, BellSouth has failed to satisfy its burden to demonstrate that its forbearance request satisfies the stringent requirements of section 10 of the Act.

Respectfully submitted,

/s/ Jason Oxman

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